



University of Baltimore Law Review

Volume 49 | Issue 2

Article 6

2020

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Recommended Citation

Hayden, Shannon (2020) "Reevaluating Maryland's Child Pornography Laws in the "Send Nudes" Era," *University of Baltimore Law Review*. Vol. 49 : Iss. 2 , Article 6.

Available at: <https://scholarworks.law.ubalt.edu/ublr/vol49/iss2/6>

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REEVALUATING MARYLAND'S CHILD PORNOGRAPHY LAWS IN THE "SEND NUDES" ERA

Shannon Hayden*

I. INTRODUCTION

In 2018, A24 Films released the film *Eighth Grade*.¹ Critics and audiences alike immediately praised the film for its “painfully real” depiction of what it is like to grow up in the age of social media.² The film follows protagonist Kayla, a bit of a “quiet outcast,”³ as she navigates her way through the last week of middle school, trying desperately to fit in.⁴ Kayla’s middle school experience is similar to that of many adolescents; she is socially awkward at school and riddled with anxiety, but at home she comes alive, where she self-produces videos for her YouTube channel.⁵ Like many of her real life counterparts, Kayla has a crush on the resident cool kid Aiden, a classmate of hers.⁶ In one memorable scene, Kayla’s middle school is having an active shooter drill.⁷ During the drill, Kayla hears from

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1. EIGHTH GRADE (A24 2018).
2. See Patrick Ryan, *Why ‘Eighth Grade’ Is the Most Painfully Real Middle School Movie You’ve Ever Seen*, USA TODAY (July 10, 2018, 12:07 PM), <https://www.usatoday.com/story/life/movies/2018/07/10/middle-school-movie-eighth-grade-feels-painfully-real/768647002/> [https://perma.cc/C2AX-LD9W]; see also Clint O’Connor, *In ‘Eighth Grade,’ a Teen’s Double Life Is Painstakingly Realistic*, TAMPA BAY TIMES (Aug. 1, 2018), https://www.tampabay.com/features/movies/In-Eighth-Grade-a-teen-s-double-life-is-painstakingly-realistic_170383017 [https://perma.cc/2XPL-7B5X]. O’Connor describes the movie as “so painstakingly realistic, you may think you’ve stumbled into a documentary.” O’Connor, *supra*.
3. Nick Schager, *‘Eighth Grade’ Is a Coming-of-Age Movie Masterpiece*, DAILY BEAST (July 12, 2018, 1:45 AM), <https://www.thedailybeast.com/eighth-grade-is-the-most-terrifyingly-realistic-movie-about-teen-girls-ever-2> [https://perma.cc/3R8U-PR9C].
4. EIGHTH GRADE, *supra* note 1.
5. See *id.*
6. See *id.*
7. See *id.*; see also Valerie Strauss, *Bo Burnham’s Dead-On Film “Eighth Grade” Is About More than the Angst of Eighth Grade*, WASH. POST (Aug. 16, 2018, 5:54 PM), <https://www.washingtonpost.com/news/answer-sheet/wp/2018/08/16/bo-burnhams->

another classmate how Aiden broke up with his last girlfriend because she refused to send him “nudes.”⁸ Upon hearing this, Kayla crawls from under her desk to Aiden’s, completely covered by the fact that the lights are off in the classroom, where she proceeds to tell Aiden how her phone is full of her own nudes.⁹ This piques Aiden’s curiosity, and before long Kayla is sending her nudes to Aiden. Unfortunately, Aiden sends the images to other eighth graders, and in the climax of the film Kayla is arrested for disseminating child pornography.

Viewers of *Eighth Grade* may not remember that scene because, well, it did not happen.¹⁰ Instead, Kayla and Aiden’s conversation is cut short when the lights flicker on, signaling the abrupt end of the active shooter drill and their conversation.¹¹ The nudes are never mentioned again, and the viewer can infer that sexually-inexperienced Kayla probably does not have these images on her phone.¹² However, this alternative plot is all too real for teenagers in the United States who have been charged with disseminating child pornography because they sent a text message with a sexually explicit photograph or video.¹³

dead-on-film-eighth-grade-is-about-more-than-the-angst-of-eighth-grade/?noredirect=on [https://perma.cc/Y4NS-4J9P].

8. See EIGHTH GRADE, *supra* note 1. “Nudes” refers to the sending and receiving of explicit images or videos through text message. See Emily Lindin, *Sexting: What You Need to Know About Sending Nudes*, TEENVOGUE (July 15, 2016), <https://www.teenvogue.com/story/sexting-nude-photos-slut-shaming> [https://perma.cc/DHE4-224S].
9. EIGHTH GRADE, *supra* note 1.
10. *See id.*
11. *See id.*
12. *See id.*
13. See Laurie Hanna, *3 Connecticut High School Students Charged Following Sexting Scandal that Involved 50 Teens*, N.Y. DAILY NEWS (Jan. 29, 2016, 9:23 AM), <https://www.nydailynews.com/news/national/connecticut-high-school-pupils-charged-sexting-scandal-article-1.2513438> [https://perma.cc/8NZD-2F6K] (discussing a Connecticut case that charged three minors with “possessing and distributing child pornography” and “obscenity” for sharing explicit photographs and videos via “Snapchat, Facetime, iMessage and other cellphone applications”). However, following this case Connecticut enacted a law addressing the issue of sexting between minors—it is still a crime, but now a misdemeanor rather than a felony. CONN. GEN. STAT. ANN. § 53a-196h (West 2019); see also Teresa Nelson, *Minnesota Prosecutor Charges Sexting Teenage Girl with Child Pornography*, AM. CIV. LIBERTIES UNION (Jan. 5, 2018, 11:45 PM), <https://www.aclu.org/blog/juvenile-justice/minnesota-prosecutor-charges-sexting-teenage-girl-child-pornography> [https://perma.cc/U7V4-JJ4U]. In Minnesota, a fourteen-year-old girl sent a “revealing selfie” to a boy through Snapchat. Nelson, *supra*. He then made a copy of the photograph and sent it

Sexting, as it has been termed, is common among teenagers in the United States.¹⁴ Prosecutors have grappled with how to address sexting among minors because the composition of these messages typically falls squarely within the statutory definition of child pornography.¹⁵ Specifically in Maryland, there is no uniform statutory approach to sexting among minors.¹⁶

In 2014, a Baltimore County high school made the news when nude photographs of minors started “showing up on a website.”¹⁷ The images were taken down, but the males who uploaded them were not prosecuted because the images were “selfies” taken by female students and consensually sent to the male students.¹⁸ Authorities determined the images “would not meet the legal definition of child pornography” and that “no legal action could be taken.”¹⁹ However, that same year in Anne Arundel County, a seventeen-year-old male was charged with child pornography after posting sexually explicit images of minor females to Instagram.²⁰ These images were also “selfies” taken by minors and consensually sent to another minor.²¹ In Carroll County, the State’s Attorney’s Office determines whether “bullying or maliciousness” is involved when deciding whether to prosecute teen sexting cases as child pornography.²² Because Maryland has no law addressing sexting among minors, there is no

to others without the girl’s permission. *Id.* She was charged with felony distribution of child pornography. *Id.*

14. See Lisa Rapaport, *Teen Sexting May Be More Common than You Think*, REUTERS (Feb. 27, 2018, 9:36 AM), <https://www.reuters.com/article/us-health-teens-sexting/teen-sexting-may-be-more-common-than-you-think-idUSKCN1GB1XF> [<https://perma.cc/9VM8-G6EN>] (noting that “[a]t least one in four teens are receiving sexually explicit texts and emails, and at least one in seven are sending sexts . . .”).
15. See Pavielle Bookman & Alesha D. Williams, *A Closer Look at Teen Sexting in the Digital Age*, A.B.A. (Apr. 1, 2014), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/criminal-law/a-closer-look-teen-sexting-the-digital-age/ [<https://perma.cc/DK8P-4THM>].
16. *Cf.* MD. CODE ANN., CRIM. LAW § 11-207 (West 2019) (Maryland has yet to amend its child pornography statute to account for minors who engage in sexting).
17. Alison Knezevich, *Teen Sexting Remains a Vexing Problem for Law Enforcement*, BALT. SUN (Nov. 28, 2014, 6:00 AM), <https://www.baltimoresun.com/news/maryland/bs-md-sexting-20141127-story.html> [<https://perma.cc/N85F-FMWE>].
18. *Id.*
19. *Id.*
20. *Id.*
21. See *id.*
22. *Id.*

clear approach for prosecutors to take while handling these cases.²³ This has led to an inconsistent application of the law.²⁴

This Comment argues that the Maryland Legislature should amend the child pornography statute so that it directly addresses minors who engage in sexting.²⁵ Part II begins by addressing the development of child pornography laws through their constitutional jurisprudence.²⁶ Part III explores the evolution and rise of sexting in tandem with the development of smartphones.²⁷ Part IV examines how other states have addressed the issue of minors sexting.²⁸ Finally, Part V sets forth a recommendation to the Maryland Legislature on how to address sexting among minors through state statute.²⁹

II. CONSTITUTIONAL JURISPRUDENCE OF CHILD PORNOGRAPHY LAW

Laws prohibiting child pornography have been a relatively recent development in the United States.³⁰ The first federal statute addressing child pornography was enacted in 1978.³¹ This statute aimed to curb the burgeoning child pornography industry across the country, which Congress categorized as “highly organized” and “growing at a rapid rate.”³² The statute has since been amended ten times to strengthen laws prohibiting the production, dissemination, promotion, and possession of child pornography.³³ States began enacting their own child pornography statutes around the same time period that Congress enacted the federal statute.³⁴ However, “it took

23. Cf. MD. CODE ANN., CRIM. LAW § 11-207 (West 2019).

24. See Knezevich, *supra* note 17.

25. See *infra* Part V.

26. See *infra* Part II.

27. See *infra* Part III.

28. See *infra* Part IV.

29. See *infra* Part V.

30. See Amy Adler, *Inverting the First Amendment*, 149 U. PA. L. REV. 921, 928–29 (2001).

31. The Protection of Children Against Sexual Exploitation Act of 1977, Pub. L. No. 90-22, 92 Stat. 7 (1978) (codified as amended at 18 U.S.C. §§ 2251–52, 2256 (2012)).

32. S. REP. NO. 95-438, at 5 (1977).

33. See 18 U.S.C. §§ 2251–52.

34. See *generally* COLO. REV. STAT. ANN. § 18-6-403 (West 2019) (originally enacted in 1979); see *generally* MASS. GEN. LAWS ANN. ch. 272, § 29B (West 2019) (originally enacted in 1977); see *generally* 18 PA. STAT. AND CONS. STAT. ANN. § 6312 (West 2019) (originally enacted in 1977).

several years before the courts began upholding these statutes.”³⁵ It was not until 1982 that a child pornography case finally reached the Supreme Court.³⁶

A. New York v. Ferber

In *New York v. Ferber*, the Supreme Court first held that child pornography is not protected by the Constitution.³⁷ Paul Ferber, a bookstore owner “specializing in sexually oriented products,” was indicted after he sold two films “depicting young boys masturbating” to an undercover police officer.³⁸ New York, similar to other states during this time period,³⁹ had enacted a statute in 1977 criminalizing the use of a child in a sexual performance.⁴⁰ Ferber was charged and found guilty under this statute, which controlled the dissemination of child pornography.⁴¹

Ferber’s conviction was affirmed by the Appellate Division of the New York State Supreme Court but then reversed by the New York Court of Appeals.⁴² The Court of Appeals held that the statute was unconstitutional because it violated the First Amendment.⁴³ It was both underinclusive by only criminalizing children engaged in sexual activity and overbroad because it covered materials like “medical books and educational sources,” which depicted nudity strictly for educational reasons.⁴⁴

The Supreme Court granted certiorari and reversed the Court of Appeals’ decision, holding the statute valid.⁴⁵ Relying on a myriad of reasons, the Court concluded that child pornography did not warrant First Amendment protection.⁴⁶ Justice White, writing for the

35. Jasmine V. Eggestein & Kenneth J. Knapp, *Fighting Child Pornography: A Review of Legal and Technological Developments*, 9 J. DIGITAL FORENSICS, SECURITY & L. 29, 32–33 (2014).

36. *See id.* at 33.

37. *New York v. Ferber*, 458 U.S. 747, 763 (1982).

38. *Id.* at 751–52.

39. *See supra* note 34 and accompanying text.

40. *See Ferber*, 458 U.S. at 750.

41. *Id.* at 750–52 (quoting N.Y. PENAL LAW § 263.15 (McKinney 1980)). The statute states, in relevant part, that a person is guilty when he or she “promotes any performance which includes sexual conduct by a child less than sixteen years of age.” *Id.* at 751.

42. *Id.* at 752.

43. *Id.*

44. *Id.* at 752–53.

45. *See id.* at 747, 765.

46. *See id.* at 756–65.

Court, stated “[i]t is evident beyond the need for elaboration that a State’s interest in ‘safeguarding the physical and psychological well-being of a minor’ is ‘compelling.’”⁴⁷ And, the Court found that “[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance.”⁴⁸

In upholding the statute, the Court relied on the assertion that the distribution of child pornography is related to the sexual abuse of children because it keeps a “permanent record of the children’s participation” and keeps the network open for further distribution.⁴⁹ The only way to curb the distribution and to close the network is by “imposing severe criminal penalties on persons selling . . . or otherwise promoting the product.”⁵⁰ Moreover, the Court reasoned that by allowing the promotion of child pornography, it would give those doing so an “economic motive” to continue the practice.⁵¹ By taking away the economic motive and ability to distribute child pornography without consequences, the Supreme Court hoped to curb and restrain the practice.⁵²

B. Osborne v. Ohio

After the decision in *Ferber*, there was “virtually no debate regarding the constitutionality of legislation” that prohibited the dissemination of depictions of children under a certain age engaged in sexual conduct.⁵³ But in 1990, the Supreme Court went a step further than *Ferber* in another attempt to curb the amount of child pornography being produced.⁵⁴

In *Osborne v. Ohio*, the Court held that the State of Ohio “may constitutionally proscribe the possession and viewing of child pornography.”⁵⁵ After Ohio police found four photographs depicting “a nude male adolescent posed in a sexually explicit position,”⁵⁶ Clyde Osborne was convicted of violating an Ohio statute that

47. *Id.* at 756–57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)).

48. *Id.* at 757.

49. *Id.* at 759.

50. *Id.* at 760.

51. *Id.* at 761.

52. *See id.* at 761–62.

53. Kate Dugan, Note, *Regulating What’s Not Real: Federal Regulation in the Aftermath of Ashcroft v. Free Speech Coalition*, 48 ST. LOUIS U. L.J. 1063, 1071 (2004).

54. *See id.* at 1073.

55. *Osborne v. Ohio*, 495 U.S. 103, 111 (1990).

56. *Id.* at 107.

prohibited any person from possessing or viewing child pornography.⁵⁷

Osborne challenged the constitutionality of the statute relying on *Stanley v. Georgia*.⁵⁸ In *Stanley*, the Supreme Court struck down a Georgia law prohibiting the private possession of obscene material.⁵⁹ The Court allowed persons to possess obscene materials in the comfort of their own home because a person’s privacy outweighed Georgia’s interest in public morality.⁶⁰ However, in *Osborne* the Court distinguished the holding in *Stanley*, as its holding applied only to the mere possession of obscene material and not to the possession of child pornography.⁶¹

Again, as in *Ferber*, the Court in *Osborne* relied on the policy implications of the statute.⁶² The Ohio statute was enacted to protect children and to help “destroy a market for the exploitative use of children.”⁶³ In the eight years since *Ferber* had been decided, “the child pornography market had been driven underground.”⁶⁴ In order to try and stop the growing market, states had to not only target those who created and disseminated child pornography but also had to enact statutes holding those persons who possessed child pornography criminally liable as well.⁶⁵

Ferber and *Osborne* officially ruled that statutes against disseminating child pornography and statutes prohibiting others from viewing child pornography were constitutional.⁶⁶ But the Court decided these cases before the internet developed and became a part of everyday life.⁶⁷ These cases dealt with child pornography

57. See *id.* at 106–07. The statute stated, in relevant part, “(A) No person shall do any of the following: . . . (3) Possess or view any material or performance that shows a minor who is not the person’s child or ward in a state of nudity . . .” *Id.* (quoting OHIO REV. CODE ANN § 2907.323(A)(3) (Supp. 1989)).

58. See *id.* at 108.

59. See *Stanley v. Georgia*, 394 U.S. 557, 567–68 (1969).

60. See *id.* at 565. Justice Marshall writing for the Court stated, “If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.” *Id.*

61. See *Osborne*, 495 U.S. at 108, 110.

62. See *id.* at 109.

63. *Id.*

64. *Id.* at 110.

65. See *id.* at 110–11. The Court noted that nineteen other states at the time had also proscribed the possession of child pornography. *Id.*

66. See *id.* at 111; see *New York v. Ferber*, 458 U.S. 747, 773 (1982).

67. See Gil Press, *A Very Short History of the Internet and the Web*, FORBES (Jan. 2, 2015, 10:48 AM) <https://www.forbes.com/sites/gilpress/2015/01/02/a-very-short-history-of->

produced and sold in the physical world,⁶⁸ but they could not foresee the rise and spread of virtual child pornography, transmitted through the internet.⁶⁹ In 2002, the Court would again face the ever-pervasive issue of child pornography.⁷⁰

C. *Ashcroft v. Free Speech Coalition*

In 1996, Congress enacted the Child Pornography Prevention Act (CPPA),⁷¹ outlawing “any visual depiction . . . [that] is, or appears to be, of a minor engaging in sexually explicit conduct.”⁷² This included “any photograph, film, video, picture, or computer or computer-generated image or picture.”⁷³ The CPPA thereby expanded the federal prohibition of child pornography to include a range of virtual images.⁷⁴

The statute encompassed materials using adults engaged in sexually explicit conduct who look like children or the use of computer animation to create child pornography without using real children.⁷⁵ Virtual child pornography did not actually harm any children because no children were involved in its making.⁷⁶ Shortly after Congress passed the CPPA, defendants began challenging its constitutionality on First Amendment grounds.⁷⁷

The issue of the CPPA’s constitutionality first came before the Supreme Court in *Ashcroft v. Free Speech Coalition*.⁷⁸ Justice Kennedy, writing for the Court, struck down the provisions of the CPPA banning virtual child pornography as unconstitutional and overbroad.⁷⁹ According to the Court, the CPPA prohibited “speech despite its serious literary, artistic, political, or scientific value.”⁸⁰

the-internet-and-the-web-2/#78b00b447a4e [https://perma.cc/V6MT-U58J]
(explaining that increased internet use began with the United States’ first website in 1991).

68. See *Osborne*, 495 U.S. at 110; see *Ferber*, 458 U.S. at 751–52.

69. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 241–42 (2002).

70. See *id.* at 239.

71. Child Pornography Prevention Act of 1996, 18 U.S.C. §§ 2251–56 (2000).

72. 18 U.S.C. § 2256(8)(B).

73. 18 U.S.C. § 2256(8).

74. See *id.*

75. See *Ashcroft*, 535 U.S. at 239–40.

76. See *id.* at 241.

77. Debra D. Burke, *Thinking Outside the Box: Child Pornography, Obscenity and the Constitution*, 8 VA. J.L. & TECH. 1, 8 (2003).

78. See *Ashcroft*, 535 U.S. at 239–40.

79. See *id.* at 256.

80. *Id.* at 246.

Award winning films would be considered virtual child pornography under the statute.⁸¹ The Court distinguished *Ashcroft* from *Ferber* and *Osborne*, in writing that virtual child pornography “records no crime and creates no victims by its production.”⁸² Up until *Ashcroft*, the Court had found that all child pornography statutes pass constitutional muster.⁸³ Finally, the Court had drawn the line between what may and may not warrant protection.⁸⁴

The Court “limited the reach” of *Ferber* and *Osborne* by protecting virtual child pornography.⁸⁵ This decision made it clear that the Court’s concern with child pornography is the harm of “actual children during the creation process, and not for materials that may be used to harm children in the future.”⁸⁶ Under this reasoning, the practice of consensual and voluntary sexting should not be criminalized because it does not harm children.⁸⁷ While the practice of it may fall within definitions of child pornography,⁸⁸ the policy behind the law favors protecting children, not prosecuting them.⁸⁹

Moreover, when the Court decided *Ashcroft* in 2002 it could not fully foresee nor understand the technological revolution about to ensue in the United States with the rise of smartphones.⁹⁰ Thus, the Court could not predict that sexting would become a common

81. *See id.* at 247–48.

82. *Id.* at 250–51.

83. *See Osborne v. Ohio*, 495 U.S. 103, 111 (1990); *see New York v. Ferber*, 458 U.S. 747, 773 (1982).

84. *See Ashcroft*, 535 U.S. at 250–51.

85. W. Jesse Weins & Todd C. Hiestand, *Sexting, Statutes, and Saved by the Bell: Introducing a Lesser Juvenile Charge with an “Aggravating Factors” Framework*, 77 TENN. L. REV. 1, 15 (2009).

86. *Id.*

87. *See id.*; *see also* Melissa Jenco, *Researchers Call for Decriminalization of Consensual Teen Sexting*, AM. ACAD. PEDIATRICS NEWS (Apr. 15, 2019), aappublications.org/news/2019/04/15/sexting041519 [<https://perma.cc/JG3M-TKL3>].

88. *See Child Pornography*, U.S. DEP’T JUST., justice.gov/criminal-ceos/child-pornography [<https://perma.cc/K2GV-QQKU>] (last updated July 25, 2017) (“Federal law defines child pornography as any visual depiction of sexually explicit conduct involving a minor (persons less than 18 years old).”).

89. *See Act’s Prohibition on Simulated Child Porn is Unconstitutional*, REPS. COMMITTEE FOR FREEDOM PRESS, rcfp.org/journals/the-news-and-the-law-winter-2000/acts-prohibition-simulated/ [<https://perma.cc/3VF7-L26A>] (last visited Dec. 26, 2019).

90. *See* Kevin Jackson, *A Brief History of the Smartphone*, SCI. NODE (July 25, 2018), scienode.org/feature/How%20did%20smartphones%20evolve.php [<https://perma.cc/N9V2-5C8F>].

practice among American teenagers.⁹¹ But even if the Court could have predicted this practice, its desire to protect children favors the decriminalization of consensual and voluntary sexting.⁹² Minors who engage in sexting are not victims of the child pornography market.⁹³ They are exploring their burgeoning sexuality through a device they have grown up using—the smartphone.⁹⁴

III. THE RISE OF SEXTING IN THE SOCIAL MEDIA ERA

“Sexting,” a combination of the words “sex” and “texting,” refers to the sending and receiving of sexually explicit messages, images, and videos via cellphone.⁹⁵ Eli Rosenberg of *The Atlantic* found that the first time the word “sext” was used in a mainstream media publication was 2004, in the Canadian publication, *The Globe and Mail*.⁹⁶ In 2005, the term “sext-messaging” appeared nationally in a *Los Angeles Times*’ article, but then all but disappeared again until 2008 when a story about sexting was thrust into the national spotlight.⁹⁷ In 2011, “sexting” was officially added to the *Concise Oxford English Dictionary*.⁹⁸ In 2012, *Merriam-Webster Dictionary* followed suit and officially added “sexting” to its dictionary.⁹⁹

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91. See Perri Klass, *Teenagers Are Sexting – Now What?*, N.Y. TIMES (Mar. 12, 2018), nytimes.com/2018/03/12/well/family/teens-are-sexting-now-what.html [<https://perma.cc/3ES7-RUVS>].
 92. See Matthew H. Birkhold, *Freud on the Court: Re-interpreting Sexting & Child Pornography Law*, 23 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 897, 910–11 (2013).
 93. See Weins & Hiestand, *supra* note 85, at 29.
 94. See Raychelle Cassada Lohmann, *5 Reasons Teens Sext*, U.S. NEWS (May 18, 2017, 9:47 AM), <https://health.usnews.com/wellness/for-parents/articles/2017-05-18/5-reasons-teens-sext> [<https://perma.cc/GN85-LSHM>].
 95. See Weins & Hiestand, *supra* note 85, at 1–2.
 96. Eli Rosenberg, *In Weiner’s Wake, a Brief History of the Word ‘Sexting’*, ATLANTIC (June 9, 2011), <https://www.theatlantic.com/national/archive/2011/06/brief-history-sexting/351598/> [<https://perma.cc/UTR3-DNLF>].
 97. *Id.*
 98. See Angela Watercutter, *Oxford Dictionary Defines Sexting, Cyberbullying*, WIRED (Aug. 18, 2011, 4:44 PM), <https://www.wired.com/2011/08/oxford-dictionary-sexting/> [<https://perma.cc/QL3R-EAKH>].
 99. Kory L. Stamper, *New Words Added to Merriam-Webster Dictionary: ‘Man Cave,’ ‘Sexting’ and More*, DAILY BEAST (Aug. 14, 2012, 6:00 AM), <https://www.thedailybeast.com/new-words-added-to-merriam-webster-dictionary-man-cave-sexting-and-more> [<https://perma.cc/BY66-ZAZC>].

Sexting has gone from being considered a “deviant” behavior to a more generally accepted practice.¹⁰⁰ The term entered into the everyday vernacular around the same time that the smartphone was invented.¹⁰¹ Apple’s iPhone was first released in 2007,¹⁰² and similar devices followed soon after.¹⁰³ Further, 2007 was the first year that Americans sent and received more text messages per month than phone calls.¹⁰⁴ Today, the average age that children receive their first cellphone is 10.3 years old.¹⁰⁵

Minors are being exposed to sexting at a young age, but it is not just limited to the youngest generation.¹⁰⁶ Seventy-five percent of young adults have sexted.¹⁰⁷ “Baby Boomers” have taken part in the practice of sexting as well.¹⁰⁸ Sexting has been the subject of several political scandals¹⁰⁹ and has pervaded American culture.¹¹⁰ Minors

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100. Martin Graff, *Does Sexting Have Benefits for Your Relationship?*, PSYCHOL. TODAY (Feb. 22, 2018), <https://www.psychologytoday.com/us/blog/love-digitally/201802/does-sexting-have-benefits-your-relationship> [https://perma.cc/HR5R-AA94] (citing Michelle Drouin et al., *Let’s Talk About Sexting, Baby: Computer-Mediated Sexual Behaviors Among Young Adults*, 29 COMPUTERS HUM. BEHAV. 25, 25–30 (2013)).
 101. See Stamper, *supra* note 99; see Press Release, Apple, Apple Reinvents the Phone with iPhone (Jan. 9, 2007), <https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/> [https://perma.cc/B24W-WFLS].
 102. See Press Release, Apple, *supra* note 101.
 103. See Christin Erickson, *A Brief History of Text Messaging*, MASHABLE (Sept. 21, 2012), <https://mashable.com/2012/09/21/text-messaging-history/#rIY1t0WwZqF> [https://perma.cc/MVS8-QENE].
 104. *Id.*
 105. See Brett Molina, *When Is the Right Age to Buy Your Child a Smartphone?*, USA TODAY (Aug. 24, 2017, 10:23 AM), <https://www.usatoday.com/story/tech/talkingtech/2017/08/24/when-right-age-buy-your-child-smartphone-wait-until-8-th/593195001/> [https://perma.cc/EU3N-MVQE].
 106. See Rapaport, *supra* note 14; see *infra* notes 107–08 and accompanying text.
 107. Graff, *supra* note 100.
 108. See Jessica Leshnoff, *Sexting Not Just for Kids*, AARP, https://www.aarp.org/relationships/love-sex/info-11-2009/sexting_not_just_for_kids.html [https://perma.cc/4DXX-RXSB] (last updated Aug. 29, 2016) (“[T]he reality is that more and more of the 50-plus set, both single and married, routinely use text messaging to send tantalizing pictures and provocative words to their partner . . .”).
 109. See Clint Burnham, *The Tony Clement Scandal Shows All Texting Is Sexting*, CONVERSATION (Nov. 11, 2018, 4:00 PM), <https://theconversation.com/the-tony-clement-scandal-shows-all-texting-is-sexting-106695> [https://perma.cc/JN6E-85F8]; see J. Weston Phippen, *Anthony Weiner’s Latest Sexting Scandal*, ATLANTIC (Sept. 23, 2016), <https://www.theatlantic.com/news/archive/2016/09/anthony-weiner-investigation-15-year-old-girl/501416/> [https://perma.cc/ZM86-WR3K].
 110. See Robert Weiss, *Sexting: A New Cultural Norm*, HUFFPOST (Dec. 16, 2015, 4:52 PM), https://www.huffpost.com/entry/sexting-a-new-cultural-no_b_8776128

are exposed to it not only through the news but also through music,¹¹¹ movies,¹¹² television,¹¹³ and social media.¹¹⁴ Therefore, it comes as no surprise that teenagers are engaging in sexting as well.¹¹⁵

Sexting is “becoming a normative component of teen sexual behavior and development.”¹¹⁶ Therefore, it is imperative that the law catch up to this development in technology.¹¹⁷ While some states have recognized the need to either amend their child pornography laws or enact sexting laws,¹¹⁸ other states, like Maryland, have not adjusted accordingly.¹¹⁹ This stagnation in development could prove devastating for minors if prosecuted for sexting.¹²⁰

IV. EXAMINING DIFFERING APPROACHES TAKEN BY STATES IN RESPONSE TO SEXTING BETWEEN MINORS

States have taken varied approaches to sexting.¹²¹ Some states have enacted legislation to address the practice.¹²² Other states have introduced diversionary programs which allow minors to go through therapy or educational classes instead of being charged criminally if found to be involved with sexting.¹²³ Yet other states, including Maryland, have left the issue for the courts to decide whether a minor can be found guilty under a child pornography statute for engaging in sexting.¹²⁴

[<https://perma.cc/GG8S-4ZKC>] (discussing the normalization of sexting through the invention of “hookup apps like Tinder”).

111. TAIO CRUZ FT. KE\$HA, *DIRTY PICTURE* (Universal Island Records 2010).

112. *EIGHTH GRADE*, *supra* note 1.

113. *13 Reasons Why: The First Polaroid*, NETFLIX (May 18, 2018), <https://www.netflix.com/watch/80186748?trackId=13752289>.

114. *Facts & Consequences of Sexting Parents Should Know About*, KIDS N CLICKS (Dec. 24, 2018), <https://kidsnclinks.com/sexting/> [<https://perma.cc/F9KE-VWE7>].

115. Klass, *supra* note 91.

116. *Id.* (quoting psychologist Sheri Madigan).

117. *See infra* Section IV.C.

118. *See infra* Section IV.A.

119. *See infra* notes 201–05 and accompanying text.

120. *See infra* notes 166–75 and accompanying text.

121. *See discussion infra* Sections IV.A–C.

122. *See discussion infra* Section IV.A.

123. *See discussion infra* Section IV.B.

124. *See discussion infra* Section IV.C.

A. *States that Have Enacted Legislation Addressing Sexting Between Minors*

Several states have addressed the practice of sexting between minors through statute.¹²⁵ Georgia enacted a statute that makes sexting a misdemeanor for both minors involved if: (a) both parties are at least fourteen years of age but not older than eighteen years of age, (b) the image was created with the permission of the sender, (c) the receiver possessed the image with the permission of the sender, and (d) the image was not distributed by the receiver; or if the image was distributed, it was not for malicious or commercial purposes.¹²⁶

Arizona, Florida, and Arkansas also treat sexting between minors as a misdemeanor rather than a felony offense for the first offense.¹²⁷ These states also “provide an affirmative defense if the sexually explicit content was unsolicited, not distributed, and reasonable efforts were made to delete the image or video and report it to the authorities.”¹²⁸

Nebraska still treats sexting between minors as a felony offense for second or subsequent convictions.¹²⁹ However, the statute also provides an affirmative defense if the image was created by a minor fifteen years of age but not older than nineteen years of age, the minor “knowingly and voluntarily” created and sent the image, the image contains only one person, and the minor who received the image has not distributed it.¹³⁰

While it is important that several states have taken steps to shield minors from child pornography charges stemming from sexting,¹³¹ statutes that still criminalize the act of sexting are inadequate in aiding minors.¹³² Merely downgrading a felony child pornography charge to a misdemeanor provides only minimal benefit.¹³³ Other states, recognizing the inherent issues with charging minors

125. See *infra* notes 126–30 and accompanying text.

126. See GA. CODE ANN. § 16-12-100.2(c)(3) (West 2019).

127. Bookman & Williams, *supra* note 15.

128. *Id.*; see also ARIZ. REV. STAT. ANN. § 8-309(c) (West 2019); see also ARK. CODE ANN. § 5-27-609(c) (West 2019); see also FLA. STAT. ANN. § 847.0141(1)(b) (West 2019).

129. NEB. REV. STAT. ANN. § 28-813.01(2) (West 2019).

130. § 28-813.01(3)(a)(i).

131. See *supra* notes 125–30 and accompanying text.

132. See *infra* notes 210–14 and accompanying text.

133. See *supra* notes 126–28 and accompanying text.

criminally for sexting, have sought to introduce diversionary programs before issuing criminal charges.¹³⁴

B. The Diversionary Method: States that Have Taken a Different Approach to Sexting

Diversion programs are typically pretrial programs that minors and first-time offenders enter into for rehabilitative purposes.¹³⁵ A state may address minors who engage in sexting by ordering that they go through a diversion program.¹³⁶ For example, in New Jersey, the first time a minor is charged under the State's sexting laws, they are to go through court mandated therapy rather than enter into the judicial system to resolve the issue.¹³⁷ But, the practice is still considered a crime, and prosecutors may charge minors depending on the facts of the case.¹³⁸ To try to prevent this from happening, New Jersey school districts provide presentations to students "as young as 9 years old" on the dangers of sexting.¹³⁹ This is a well-rounded approach to sexting.¹⁴⁰ By starting education on the topic early, young children can learn the possible consequences of sexting.¹⁴¹ Then, as these children grow older and sexting goes from an abstract idea to a concrete action, minors can approach sexting with adequate background knowledge of what may happen if they decide to sext.¹⁴² While New Jersey's approach protects minors to a certain extent, it still makes sexting a crime.¹⁴³

Massachusetts is in the process of trying to implement an official diversionary program similar to New Jersey.¹⁴⁴ A bill currently in

134. See discussion *infra* Section IV.B.

135. *Diversion Program*, BLACK'S LAW DICTIONARY (10th ed. 2014).

136. See *supra* notes 137–46 and accompanying text.

137. N.J. STAT. ANN. § 2A:41-71.1(a) (West 2019).

138. See David Matthau, *How NJ Laws and Prosecutors Treat Kids Caught Sexting*, N.J. 101.5 (Oct. 28, 2018), <http://nj1015.com/how-nj-laws-and-prosecutors-treat-kids-caught-sexting/> [<https://perma.cc/D2G7-VU5W>].

139. Michaelangelo Conte, *Jersey City Students, as Young as 9, Are Being Warned that Sexting Is a Crime*, NJ.COM (Jan. 2, 2019), <https://www.nj.com/jjournal-news/2019/01/jersey-city-students-as-young.html> [<https://perma.cc/6WGR-NKX5>].

140. See *infra* notes 143–44 and accompanying text.

141. See Matthew Lynch & Suzanne Bogdan, *Sexting: What K-12 Schools Should Know*, TECH EDVOCATE (July 16, 2018), <https://www.thetechedvocate.org/sexting-what-k-12-schools-should-know/> [<https://perma.cc/3N98-JN78>].

142. See *id.*

143. See Matthau, *supra* note 138.

144. See Press Release, Office of Governor Charlie Baker & Lieutenant Governor Karyn Polito, Baker-Polito Administration to Re-file Bill Modernizing the Laws that Govern

the Massachusetts House of Representatives recommends that minors participate in an educational program instead of being charged as child pornographers and sent to prison or juvenile detention.¹⁴⁵ Massachusetts Governor Charlie Baker, who first filed the bill in 2017, wrote, “These felony offenses are too severe a sanction for conduct that, while covered by the respective statutes, is not what lawmakers had in mind when they outlawed child pornography.”¹⁴⁶

These diversionary programs are rehabilitative in nature.¹⁴⁷ They do not carry the harsh sentences and repercussions that follow both felonies and misdemeanors.¹⁴⁸ These types of programs allow minors to learn from what legislatures have deemed to be mistakes by treating sexting incidents as a lapse in judgement rather than a crime.¹⁴⁹ Yet, the diversionary approach does not fully protect minors because it is still possible to be charged criminally.¹⁵⁰ There must be more done to protect minors and take their actions outside of the scope of criminal law.¹⁵¹ Diversionary programs may fall short, but the outcome of being placed in a rehabilitative diversionary

Explicit Images (Feb. 6, 2019), <https://www.mass.gov/news/baker-polito-administration-to-re-file-bill-modernizing-the-laws-that-govern-explicit-images> [https://perma.cc/DS3G-83G9]. At the time of writing this comment, sexting offenses by minors would fall within the child pornography statute, a felony offense. MASS. GEN. LAWS ANN. ch. 272, § 29B (West 2019).

145. Press Release, Office of Governor Charlie Baker & Lieutenant Governor Karyn Polito, *supra* note 144.

146. Christina Cauterucci, *Massachusetts Governor Proposes Bill Protecting Teen Sexters from Felony Charges*, SLATE (Apr. 27, 2017, 1:43 PM), <https://slate.com/human-interest/2017/04/massachusetts-governor-proposes-bill-protecting-teen-sexsters-from-felony-charges.html> [https://perma.cc/DG3X-6LLM].

147. See Debra T. Landis, Annotation, *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R. 4th 147, 151 (1981).

148. See *Washington Legislature Passes Reforms to Protect Teens from Prosecution for Sexting*, AM. CIV. LIBERTIES UNION WASH. (Apr. 24, 2019), <https://www.aclu-wa.org/news/washington-legislature-passes-reforms-protect-teens-prosecution-sexting> [https://perma.cc/9JA9-W8SK].

149. See Press Release, Office of Governor Charlie Baker & Lieutenant Governor Karyn Polito, *supra* note 144. Sexting can still be considered a criminal act in states focused on diversionary practices. See Matthau, *supra* note 138. Prosecutors will look to facts of the case and whether any bullying or malicious behavior was involved in the distribution of the images or videos. See *Washington Legislature Passes Reforms to Protect Teens from Prosecution for Sexting*, *supra* note 148.

150. See *supra* notes 137–43 and accompanying text.

151. See *infra* Section V.

program is less harsh than when courts render decisions involving minors who sext.¹⁵²

C. When Sexting Is Left to the Courts

While some states have addressed minors who engage in sexting,¹⁵³ others have failed to account for this development in technology and culture.¹⁵⁴ Instead, the courts are left to determine how to address sexting.¹⁵⁵ Unfortunately, with no direct statutory language in place, courts must rely on child pornography statutes.¹⁵⁶ Predictably, this has led to less than favorable outcomes for minors.¹⁵⁷

1. *State v. Gray*

In 2017, the Supreme Court of Washington affirmed the criminal conviction of Eric Gray who, at seventeen-years-old, sent a sexually explicit photograph via text message to an adult recipient.¹⁵⁸ The text message at issue contained a photograph of an erect penis as well as the language, “Do [you] like it babe?”¹⁵⁹ T.R., the recipient of the message, unsurprisingly did not like receiving the unsolicited photograph and reported Gray to the police.¹⁶⁰ Gray, who suffers from Asperger’s Syndrome,¹⁶¹ admitted to the police that he sent the picture because T.R. worked for Gray’s mother and Gray was attracted to her.¹⁶² Gray was charged with and convicted of “one count of second degree dealing in depictions of a minor engaged in sexually explicit conduct under [Washington law].”¹⁶³ Gray appealed the decision to the intermediate appellate court, which affirmed his conviction.¹⁶⁴

152. *See infra* Section IV.C.

153. *See supra* Sections IV.A–B.

154. *See infra* Sections IV.C.1–2.

155. *See infra* Sections IV.C.1–2.

156. *See infra* notes 166–70, 185–89 and accompanying text.

157. *See infra* notes 165–70, 176–77 and accompanying text.

158. *State v. Gray*, 402 P.3d 254, 256 (Wash. 2017).

159. *Id.*

160. *See id.*

161. *Id.* Asperger’s Syndrome is defined as “a subtype of Autism Spectrum Disorder . . . characterized by major problems in social and nonverbal communication, together with limited and repetitive forms of behavior and interests.” Farnaz Faridi & Reza Khosrowabadi, *Behavioral, Cognitive and Neural Markers of Asperger Syndrome*, 8 BASIC & CLINICAL NEUROSCIENCE 349, 349 (2017).

162. *Gray*, 402 P.3d at 256.

163. *Id.*

164. *Id.*

The Supreme Court of Washington granted certiorari and upheld Gray’s conviction.¹⁶⁵ The Court relied on the plain language of the statute finding that “when any person, *including a juvenile*, develops, publishes, or disseminates a visual depiction of any minor engaged in sexual conduct, that person’s actions fall under [the] statute’s provisions.”¹⁶⁶ It did not matter to the Court that a minor sent the photograph.¹⁶⁷ Gray’s actions fell directly within the statute’s plain meaning.¹⁶⁸ The Court understood the implications of affirming Gray’s conviction: that other minors may be prosecuted for sexting.¹⁶⁹ However, their hands were tied by the statute available to them.¹⁷⁰

The dissent argued that the majority’s interpretation of the statute would produce “absurd results” and “punish[] children.”¹⁷¹ The dissent is correct.¹⁷² Although this was not a case with consensual sexting, it sets a dangerous precedent that minors cannot expect aid from the courts.¹⁷³ When there are only child pornography statutes for courts to interpret, minors will continue to be found guilty when prosecuted for sexting.¹⁷⁴ This is as true in Washington as it is in Maryland, where a sixteen-year-old was found guilty of distributing child pornography in a sexting case.¹⁷⁵

2. In re S.K.

In August 2019, the Court of Appeals of Maryland affirmed the Court of Special Appeals by upholding a young woman’s

165. *Id.* at 257, 261.

166. *Id.* at 257–58 (emphasis added).

167. *See id.* at 258.

168. *Id.*

169. *See id.* (“We understand the concern over teenagers being prosecuted for consensually sending sexually explicit pictures to each other. We also understand the worry caused by a well-meaning law failing to adapt to changing technology. But our duty is to interpret the law as written and, if unambiguous, apply its plain meaning to the facts before us.”).

170. *See id.* at 257–59 (stating that the court is bound to apply the plain language of the statute because it is unambiguous and plain on its face).

171. *Id.* at 262 (McCloud, J., dissenting).

172. *See* Mark Joseph Stern, *Maryland’s Unjust Court Decision on Sexting*, SLATE (Aug. 29, 2019, 5:32 PM), <https://www.slate.com/technology/2019/08/253aryland-sk-court-case-teen-sexting-child-pornography.html> [<https://perma.cc/H45F-RU5G>].

173. *See Gray*, 402 P.3d at 262–66 (McCloud, J., dissenting).

174. *See generally id.* at 257–59 (stating that although the statute seeks to address the exploitation of children by adults, the statute is read broadly with the legislative intent of similar statutes).

175. *In re S.K.*, 215 A.3d 300, 303–04 (Md. 2019).

involvement¹⁷⁶ in distributing child pornography for sending a sexually explicit video to her friends via text message.¹⁷⁷

S.K., who was sixteen-years-old at the time, sent a text message to two of her friends, who were also minors, “containing an approximately one-minute-long digital video file of herself performing fellatio on a presumably-adult male.”¹⁷⁸ The friend group had a falling out, and S.K.’s friends shared the video with their school resource officer.¹⁷⁹ The juvenile court found S.K. to be “involved in distributing child pornography and displaying an obscene item to a minor.”¹⁸⁰ Further, the court found S.K. to be delinquent and ordered that she undergo a psychiatric evaluation.¹⁸¹ She appealed to Maryland’s intermediate appellate court.¹⁸²

Like Washington,¹⁸³ Maryland is a state that has failed to address minors who engage in sexting, so courts are forced to adhere to child pornography statutes in determining cases like S.K.’s.¹⁸⁴ Relying on traditional tools of statutory construction, the Court of Special Appeals rejected S.K.’s argument that because she was a willing participant in the video the child pornography distribution statute¹⁸⁵ was not applicable.¹⁸⁶ In doing so, the court found the statute only requires “a minor appear as a participant in . . . sexual conduct . . . not that there was an absence of lawful consent.”¹⁸⁷ The court further rejected S.K.’s policy argument that the legislative history did not intend to criminalize the children depicted in the imagery.¹⁸⁸ Again, the court relied on the plain meaning of the statute as opposed to the

176. In Maryland, a minor who is adjudicated by a juvenile court is found to be “involved” in offenses not “convicted” of those offenses. MD. CODE ANN., CTS. & JUD. PROC. § 3-8A23(a)(1) (West 2019).

177. *In re S.K.*, 215 A.3d at 306.

178. *In re S.K.*, 186 A.3d 181, 183 (Md. Ct. Spec. App. 2018), *aff’d in part, rev’d in part*, *In re S.K.*, 215 A.3d 300.

179. *Id.* at 184.

180. *Id.*

181. *Id.*

182. *Id.*

183. See *supra* notes 165–75 and accompanying text.

184. See generally *In re S.K.*, 186 A.3d 181.

185. In relevant part, the statute prohibits a “person” from knowingly distributing “any matter, visual, representation, or performance . . . that depicts a minor engaged as a subject in . . . sexual conduct.” MD. CODE ANN., CRIM. LAW § 11-207(a)(4)(i) (West 2019).

186. *In re S.K.*, 186 A.3d at 185.

187. *Id.* at 188.

188. *Id.*

policy implications.¹⁸⁹ S.K.’s case demonstrates the need for an updated statute that directly addresses sexting as conduct.¹⁹⁰

Not all hope was lost for S.K. though, as the Court of Special Appeals agreed with her on the issue of whether she was “involved in displaying an obscene item to a minor.”¹⁹¹ S.K. argued that the digital file sent via text message did not constitute an “item” under the statute.¹⁹² Vacating the juvenile court’s finding, the court concluded that the video file was not a “film” under the statute.¹⁹³ The court admonished the General Assembly for not keeping pace with advances in technology, noting that the last addition to what constituted an “item” under the statute was a “video game” added in 2006.¹⁹⁴ Clearly, there exists a large gap between law and technology in the area of child pornography.¹⁹⁵

Following the Court of Special Appeals decision, both S.K. and the State filed petitions for writ of certiorari,¹⁹⁶ which the Court of Appeals granted on October 9, 2018.¹⁹⁷ The court “dramatically” framed the issue as whether “a minor legally engaged in consensual sexual activity [can] be his or her own pornographer through the act of sexting?”¹⁹⁸ Unfortunately for S.K., and other minors in Maryland who engage in sexting, the court found the statute “in its plain meaning” to be “all-encompassing,”¹⁹⁹ so S.K.’s sexting was “within the purview of [the] current statutory scheme.”²⁰⁰

However, the court was explicit in its belief that the General Assembly has failed to keep up with the development of technology.²⁰¹ The court noted that the child pornography statute has not been amended since 1986,²⁰² and that a “majority of states have

189. *Id.* “Regardless of whether S.K.’s argument may have merit as a matter of policy, it has no merit as a matter of statutory construction.” *Id.*

190. *See supra* notes 176–89 and accompanying text; *see also* discussion *infra* Part V.

191. *In re S.K.*, 186 A.3d at 195; *see* MD. CODE ANN., CRIM. LAW § 11-203(b)(1)(ii) (West 2019).

192. *In re S.K.*, 186 A.3d at 196.

193. *Id.* at 197 (determining that “film” could “only be a reference to film as a physical medium that can contain content, and not as a video itself”).

194. *Id.* at 198. Moreover, the court noted, “[i]t is not within our province to expand the coverage of the statute beyond the contours of its unambiguous language.” *Id.*

195. *See id.*

196. *In re S.K.*, 215 A.3d 300, 305 (Md. 2019).

197. *Id.*

198. *Id.* at 303.

199. *Id.* at 315.

200. *Id.* at 306.

201. *See id.* at 306–10.

202. *Id.* at 310.

passed legislation to amend their child pornography statute relative to sexting,” but that Maryland lags behind as “one of twenty-one states that have not passed any such legislation and thus permit[s] teenagers to be charged under the child pornography statute.”²⁰³ Furthermore, the court recognized “that there may be compelling policy reasons for treating teenage sexting different from child pornography,” but the court was bound by the child pornography statute as it is currently written.²⁰⁴ And, as currently written, sexting falls within the conduct of the statute.²⁰⁵

Understandably, S.K.’s case received heavy media attention.²⁰⁶ Hopefully, this new spotlight on Maryland’s General Assembly will generate actual action to spur a necessary change in the law. *In re S.K.* has demonstrated that it is imperative to reevaluate state child pornography laws in light of advancing technology and shifts in culture.²⁰⁷ It is time to stop criminalizing consensual sexting when it involves minors.²⁰⁸ The best time to amend the statute would have been ten years ago.²⁰⁹ The second best time is now.

V. RECOMMENDATION

Currently, Maryland law fails to address sexting in any statutory capacity.²¹⁰ In doing so, the Maryland Legislature has failed to protect minors who are engaging in sexting with increasing regularity.²¹¹ It is necessary to amend the law, so that minors who choose to engage in consensual sexting will no longer face the risk of felony child pornography charges.²¹² Further, amending the statute

203. *Id.* at 308.

204. *Id.* at 315.

205. *Id.*

206. See Tasneem Nashrulla, *A Teen Is a Child Pornographer for Sexting a Video of Herself to Her Friends, a Court Ruled*, BUZZFEED NEWS (Aug. 29, 2019, 4:12 PM), <https://www.buzzfeednews.com/article/tasneemnashrulla/teen-sexting-child-pornography-maryland-law?origin=tuh> [<https://perma.cc/49UN-6LLJ>]; see Stern, *supra* note 172; see David Jaros (@ProfDavidJaros), TWITTER (Aug. 29, 2019, 7:54 AM), <https://twitter.com/ProfDavidJaros/status/1167088025739780096> [<https://perma.cc/FN9E-U2QN>].

207. See *In re S.K.*, 215 A.3d at 315; see Nashrulla, *supra* note 206.

208. See *supra* text accompanying notes 85–94.

209. See *supra* Part III.

210. See MD. CODE ANN., CRIM. LAW §§ 11-201 to -211 (West 2019).

211. See *supra* notes 201–05 and accompanying text.

212. See CRIM. LAW § 11-207 (“A person who violates this section is guilty of a felony and on conviction is subject to: . . . imprisonment not exceeding 10 years or a fine not exceeding \$25,000 or both.”).

will unify the approach taken by law enforcement and prosecutors in sexting cases.²¹³ Uniformity is important because it protects the class of people who are regularly subjected to over-policing.²¹⁴ There are several options that should be considered.²¹⁵

One proposal put forward in *State v. E.G.*²¹⁶ is that if a legislature desires, it can choose to eliminate all child pornography not created for commercial reasons from statutory control.²¹⁷ This approach would include all self-produced images created for the purpose of sexting.²¹⁸ The defendant in *State v. E.G.* suggested that under such a reform, no minor could be prosecuted for sexting again.²¹⁹ However, this approach is a bit extreme and unlikely to gain support.²²⁰

Another, more reasonable, approach would be to create an exception for sexting directly within the child pornography statute.²²¹ Specifically, the Maryland Legislature should enact an exception that exempts minors under seventeen who engage in consensual sexting with other minors from being charged with distributing child pornography. Sexting conduct by minors with other minors would be wholly decriminalized by this approach.

However, this exception will not apply to minors who send sext messages without the consent of the recipient, as well as minors who distribute sext messages to third parties without the consent of the

213. See *supra* notes 17–24 and accompanying text.

214. Black children, and especially black girls, are subjected to “adultification” at a young age and are more likely to be perceived by adults as “less innocent and more adult-like than their white peers,” which leads to “more punitive exercise[s] of discretion by those in positions of authority, greater use of force, and harsher penalties.” Rebecca Epstein et al., *Girlhood Interrupted: The Erasure of Black Girls’ Childhood*, GEO. L. 1–2 (2017) (emphasis omitted), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf> [<https://perma.cc/W6NE-WEDW>]. While there is no data available as to the race or class of minors being prosecuted in sexting cases, one can infer that persons of color as well as the poor will be targeted more heavily. *Id.* at 2, 12; see *Criminal Justice Reform*, EQUAL JUST. INITIATIVE, <https://eji.org/criminal-justice-reform/> [<https://perma.cc/GFZ7-2AJN>] (last visited Dec. 26, 2019).

215. See *infra* notes 216–32 and accompanying text.

216. See discussion *supra* Section IV.C.1.

217. *State v. E.G.*, 377 P.3d 272, 278 (Wash. Ct. App. 2016), *aff’d sub nom. State v. Gray*, 402 P.3d 254 (Wash. 2017).

218. *Id.*

219. See *id.* at 276.

220. Not only would this proposal remove consensual sexting from the realm of child pornography, but it would also decriminalize the unconsented to distribution of these images by the recipient or a third party. See *id.*

221. See generally MD. CODE ANN., CRIM. LAW § 11-207 (West 2019).

sender. This conduct, while still criminal,²²² shall be downgraded from a felony to a misdemeanor with a recommendation that upon the first offense, an offender take part in a diversionary program.²²³

Similar to the diversionary program in New Jersey, a court may order a minor found to be involved in non-consensual sexting to go through an eight-hour program on the importance of privacy and technology.²²⁴ These programs, while they may be informative, do not have to be drawn out over several weeks or months.²²⁵ They would be similar to single day driver improvement programs that Maryland courts can order traffic violators to attend.²²⁶ A court ordered diversionary program would allow minors to make a mistake without jeopardizing their future and hopefully learn from the experience.²²⁷

Moreover, minors age sixteen or above who engage in sexting with adults should also be exempt from child pornography charges.²²⁸ While this proposal may be controversial, the age of consent in Maryland is sixteen.²²⁹ The Legislature should not be able to apply a harsh punishment to minors who engage in sexting,²³⁰ but not minors who engage in sex.²³¹ However, if an adult who received a sext from a minor then disseminated the image or video, he or she would still be criminally liable under the child pornography statute.²³²

By making these necessary changes to the laws,²³³ the Maryland Legislature can demonstrate that it recognizes how technologically advanced today's world is.²³⁴ Sex is digital now, and the laws should account for it.²³⁵ Furthermore, these proposed amendments would wholly protect minors from criminal charges stemming from normal

222. *Id.*

223. *See supra* Section IV.B.

224. *See supra* Section IV.B.

225. *See* MD. CODE ANN., TRANSP. § 16-212 (West 2019); *see* Press Release, Office of Governor Charlie Baker & Lieutenant Governor Karyn Polito, *supra* note 144.

226. TRANSP. § 16-212(c)(2).

227. *See* Press Release, Office of Governor Charlie Baker & Lieutenant Governor Karyn Polito, *supra* note 144.

228. A person can consent to sexual relations in Maryland generally at sixteen-years-old. *Garnett v. State*, 632 A.2d 797, 800 (Md. 1993).

229. *Id.*

230. *See* Stern, *supra* note 172.

231. *See id.*

232. *See* MD. CODE ANN., CRIM. LAW § 11-207 (West 2019).

233. *See supra* notes 210-14, 222-32 and accompanying text.

234. *See supra* Part III.

235. *See supra* Part III.

teenage conduct.²³⁶ The Maryland Legislature enacted child pornography laws initially to protect children,²³⁷ and these updates would bring that protection into today’s world.²³⁸

VI. CONCLUSION

In light of technological advancements,²³⁹ the time has come for the Maryland Legislature to amend the state’s child pornography laws.²⁴⁰ Throughout history, child pornography statutes have been enacted to protect children, not prosecute them.²⁴¹ Failing to explicitly address minors who engage in sexting has led to an inconsistent application of Maryland’s child pornography laws,²⁴² ranging from no legal consequences to criminal prosecution.²⁴³ To prevent further inconsistent treatment and to ensure that minors will no longer be prosecuted for sexting, the Maryland Legislature must take action and amend the statute.²⁴⁴

236. See Klass, *supra* note 91.

237. See *Outmezguine v. State*, 641 A.2d 870, 879 (Md. 1994).

238. See *supra* text accompanying notes 221–36.

239. See discussion *supra* Part III.

240. See *supra* text accompanying notes 201–09.

241. See discussion *supra* Part II.

242. See *supra* text accompanying notes 17–24.

243. See discussion *supra* Section IV.C.2.

244. See discussion *supra* Part V.